

# How to Abolish Democracy: Electoral System, Party Regulation and Opposition Rights in Hungary and Poland

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When it comes to Poland and Hungary, everyone is talking about the judiciary, about the independence of the courts, about the rule of law. But hardly anyone talks about parliaments. Yet they are at the heart of our democracies. And they are no less at risk. This became clear in the third panel of our workshop, which dealt with the electoral system, party regulation and opposition rights in Hungary and Poland. What may sound technical at first glance are surprisingly effective instruments in the hands of autocrats. It is precisely with these instruments that the governments of both countries have set the course for a “democracy” that primarily benefits the ruling parties and undermines political plurality.

## Electoral Law

One of the most vivid examples of this strategy is the legal framework for elections, currently in place in **Hungary**. It was comprehensively revised by the Orbán government in the run-up to the 2014 parliamentary elections. With the help of this “legal overhaul”, as the International Election Observer Mission of the Organization for Security and Cooperation in Europe (OSCE) aptly put it in its [2014 report](#), Fidesz succeeded in transforming a 45% majority of votes into a constitutional supermajority of seats. This comes from an [interplay of several tricky changes](#). First of all, there has been a Fidesz-friendly reshaping of constituencies. Under the new law, “left-wing” districts are systematically larger than “right-wing” districts. In larger districts, however, more votes are needed to win a mandate, so each vote counts less. This systematically favors “right-wing” districts and thus Fidesz. Another tricky change made by Fidesz for Fidesz was giving dual citizenship to ethnic Hungarians who have never lived in Hungary. With Orbán’s new Constitution, about 600 000 ethnic Hungarians who are highly favorable to the right have been granted the right to vote, while at the same time it was made much more difficult for Hungarian citizens living abroad to participate in the elections.

The change that struck me most however is the so called “[winner compensation](#).” It’s a bit complicated, but it’s worth understanding. Many mixed electoral systems allow for voter compensation. That’s what makes them more representative. In short, a vote for a single candidate who loses the district is used to supplement the totals on the party list. Thus, voter compensation compensates for “lost votes.” That is why it is called compensation in the first place. Under the new election framework, however, voter compensation also applies to the winning party. What should the

winner be compensated for, you may ask. He already won the individual mandate. Yes, but if he did so with more votes than necessary, then those surplus votes can be considered “wasted.” Therefore, the “winner compensation” compensates the party winning a single constituency for multiple votes by granting it additional points in the calculation of the party list. That’s proportional representation à la Hungarian nowadays.

This clever legal framework was already well in place, when the 2018 elections were held. These were severely criticized by the OSCE Election Observer Mission. Its [report](#) identifies numerous violations of international standards, including “a pervasive overlap between state and ruling party resources”, opaque campaign financing and a partisan Electoral Commission.

The latter is still to come for **Poland**: from 2019, the National Electoral Commission, by fundamentally changing its composition, will, to all expectations, become strongly politicized. This is probably the most crucial element of the electoral reform passed by the Polish parliament less than a year ago, the most controversial elements of which will enter into force after the upcoming parliamentary elections. The Polish National Electoral Commission monitors the entire electoral process. It is responsible for the registration of parties and candidates, manages the electoral rolls, supervises the procedure of the elections and announces the final results. Moreover, it monitors party finances and can retain state subsidies for parties. Thus, its importance goes far beyond the election process itself. Currently, the National Electoral Commission consists of nine judges, of whom three each come from the Supreme Court, the Supreme Administrative Court and the Constitutional Tribunal. When the new rules enter into force next year, only three of the nine members will still be judges, the rest being appointed by the political factions of the Sejm in proportion to their respective share of seats. One of the remaining judges will come, of all places, from the Constitutional Court which is already controlled by the PiS. In this way, what happens to the judiciary and the rule of law finally infects one of the most important acts of democracy, the vote.

## Party Regulation

The same applies for political parties and the oversight of their finances. Political parties in both Poland and Hungary are heavily dependent on public funds. In **Poland**, State funding accounts for over 80% of the budget of the major Polish parties, while income from donations and membership subscriptions is very low. This raises questions regarding the financial independence of the political parties and becomes a particularly serious problem when a party is deprived of state funding. Take, for example, the liberal opposition party Nowoczesna, whose financial report was rejected because it had transferred funds from its party account to that of its election committee. As a result, the party lost 75% of its public funds and is *de facto* bankrupt. I am not saying that Nowoczesna acted correctly, but the impact of the decision raises questions about the proportionality of sanctions. And it shows all the more how sensitive the decision to withdraw state funding from a political party is. This is the task of the very National Electoral Commission, of which we have already heard. It can reject a party’s financial report for even minor violations. This decision

can be challenged before the Supreme Court. Nevertheless, the crucial role of the Electoral Commission in monitoring party financing demonstrates all the more the importance of its independence.

Similar to what the 2018 OSCE report for Hungary shows, the political system in Poland finally suffers from the misuse of state resources for the benefit of the ruling party. One of the most vivid examples of this is the recent campaign of the newly established government controlled Polish National Foundation. It was called “Fairness in Courts” and aimed to inform the public about the need to reform the judiciary. Numerous billboards could be seen in the streets saying: “Let’s change nothing. Are you sure this is what you want?” Again, it would have been up to the National Electoral Commission to investigate whether there was a violation of the rules on political party financing. However, when called by the opposition to do so, its Chairman stated: [“At this stage we do not have the tools necessary to verify and check if this billboard campaign violates the electoral code or the act on political parties.”](#)

When it comes to the independent monitoring of party and campaign finances, **Hungary** faces no less of a problem. The [State Audit Office](#) (SAO), a body of the National Assembly, oversees the finances of each party receiving central budget support. If it finds that a party has received “financial contributions” illegally, it is subject to *ex lege* sanctions. What is meant by such “contributions” is neither laid down by law nor clarified by jurisprudence, but is defined by the monitoring practice of the SAO itself. The looming sanctions are severe, consisting of repaying the illegally received contributions to the central budget as well as a loss of state funding in the same amount. Although the impact is serious, there is no right to judicial review of the SAO’s findings. None of this is new, but the way it is used has changed significantly since 2017. Since then, the findings of the SAO on illegal financial contributions have regularly lacked substantive justifications. Moreover, the timing of its monitoring activities has been remarkable, to say the least: shortly before the 2018 parliamentary elections, the SAO controlled the opposition parties and only them. Even though the enforcement authority announced that it would refrain from imposing sanctions before the elections, this still has a chilling effect. At the same time, the unpredictable and arbitrary approach prevents continuous public scrutiny. This happens when institutions with vast powers fall into the hands of autocrats.

A further example of how the ruling party exploits the legal framework is the proliferation of *mala fide* parties. In Hungary, a combination of party regulation, campaign financing and the electoral framework creates strong incentives for the formation of political parties. These sham parties then clog up the ballot and mislead the electorate by presenting fake options – a welcome tool for fragmenting the opposition. The question of how to avoid the formation of such sham parties while keeping the political process open to new competitors poses a dilemma for any liberal democracy. In any case, an *ex ante* procedure to verify the seriousness of a party’s political ambitions would generate its very own problems.

# Opposition Rights

Finally, we looked at what is happening in both the Hungarian and Polish parliament. In both countries, we see abusive practices on the part of the parliamentary majority, such as members of the opposition having turned off their microphones while speaking in plenary or interruption of voting without legal basis.

In **Poland**, the [Sejm's Standing Orders](#) have been amended fourteen times since the 2015 elections, including clearly antipluralist changes aimed directly at restricting opposition activity. In particular, the opposition's freedom of speech was curtailed by limiting the time for statements and objections to only 15 minutes. It is now up to the Speaker to decide arbitrarily whether to extend the speaking time. Moreover, the Presidium of the Sejm, which, incidentally, is dominated by the majority party, has been given the right to limit the number of questions that Members may ask during the first reading of a bill. What struck me most, however, is the disciplinary power of the Speaker and the Presidium: in case that a Member of Parliament violates the Standing Orders, they can make a decision to reduce the Member's salary.

Against this background, the impression remains that the governments in Poland and Hungary are acting in the manner of salami tactics. Parliamentary debate as well as parliamentary oversight are gradually cut back or discouraged until there is no more effective and vivid opposition. Here, too, the question arises: who guarantees the rights of the opposition if the Constitutional Court is captured by the ruling party? With regard to its verdict in [Karacsony v. Hungary](#) the hope may lie in the European Court of Human Rights, but the path to it is long for the parliamentary opposition in the member states.

## Lessons for Germany

With all these things in mind, what lessons can we learn for Germany?

First: it is not just about spectacular changes. It is about details and it is about measures that prepare the ground before elections even take place. And these measures interact: What happens to the judiciary has consequences for political parties as well as for electoral and opposition rights, since, if the Constitutional Courts are paralyzed, they cannot guarantee opposition rights or decide on electoral complaints. It is the big picture that matters!

Second: rules matter. It may be good practice that changes in electoral law are supported by a broad consensus across party lines. In Poland and Hungary, however, this was not the case. It may also be good practice for Members of Parliament to treat each other with respect and for Parliament's Standing Orders to be respected. In Poland and Hungary, this is no longer the case. And even if the Standing Orders are not simply circumvented, they can be changed easily and quickly. Thus, relying on its rules is no good advice for the opposition, neither in Hungary and Poland nor in Germany. How legally vulnerable the opposition's standing is in Germany was shown under the last Grand Coalition. From 2013 to 2017, the parliamentary opposition in the Bundestag was so small that together

it accounted for just under 20% of the seats – too little for the establishment of a committee of inquiry or the appeal to the Federal Constitutional Court for an abstract review of norms. To remedy this, a [special provision](#) was included in the Standing Orders to temporarily change the corresponding quotas. How to guarantee the rights of an opposition that is likely to become increasingly fragmented, however, remains uncertain.

Against this background, I believe that constitutional resilience also means strengthening norms and, if necessary, changing the constitution. In any case, the latter should apply to the “rules of the game”, that is to say the fundamental rules of our democracy. This includes the core decisions of electoral law, such as the determination of the electoral system and the translation of votes into seats (just remember “winner compensation”!). We will certainly not make right wing populist movements go away by law, not even by constitutional law, but we could and we should make it more difficult for them to change the rules of the game.

Finally: good and bad practices are exchanged within Europe and beyond. If we ourselves have [party-politically staffed election commissions](#) und a [structurally biased and overburdened supervision of party finances](#) to name just two examples, it is easy for autocrats in Poland and Hungary to point their finger at Germany: look, they’re not doing any better, so what is the problem? Constitutional resilience is, after all, not a national issue.

